In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1017

STATE OF NEBRASKA, ET AL., PETITIONERS

v.

CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners brought this action in the United States District Court for the District of Nebraska pursuant to 42 U.S.C. 418(t) for review of the correctness of assessments made by the Social Security Administration against the State of Nebraska for $129.11 in social security contributions with respect to the earnings of William R. Egenberger, a registrar of vital statistics in Dawson County, Nebraska, for the period January 1, 1951, through September 13, 1960, and for additional amounts due on the earnings of all other registrars of vital statistics during 1962 and 1963. The State's obligation was based on an agreement entered into pursuant to 42 U.S.C. 418 between the Secretary of Health, Education, and Welfare and the State, whereby the State undertook to pay the social

security taxes on the earnings of its employees and officers and the employees and officers of designated political subdivisions of the State. The sole question presented here is whether the registrars of vital statistics are "employees" within the meaning of the agreement.[1]

The evidence introduced at trial included a Manual of Instruction of the State Bureau of Vital Statistics stating that the local registrars were "subject to the direction and supervision of the Bureau of Vital Statistics," and the testimony of the director of that bureau that she regularly exercised such supervision. On the basis of this and other evidence, the district court found that registrars of vital statistics are employees of the State because "the State of Nebraska, through the bureau of vital statistics, exercises a significant degree of control over the manner in which the local registrar of vital statistics performs his functions" (Pet. App. 30). The court of appeals affirmed (Pet. App. 19-20).

2. This case presents solely the factual question whether the State of Nebraska exercised sufficient control over the performance of the duties of the registrar of vital statistics to establish an employment relationship. This fact has been resolved against petitioners by both courts below; accordingly there is no cause for further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271. Contrary to petitioners' contention, the decision below is not in conflict with *United States* v. *Webb*, 397 U.S. 179. The legal standards

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[1] Under the agreement (Pet. App. 36), the term "employee" means an employee as defined by Section 210 of the Social Security Act, 42 U.S.C. 410, and includes an officer of the State or of a political subdivision thereof. Section 210 defines an employee as an individual who has the status of an employee under the common law.

for determining employee status established in that case were followed by the courts below.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.